IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

Nos. 1008 and 1009

IN THE MATTER OF
SOUTH STATE STREET BUILDING CORPORATION, A CORPORATION,
DEBTOR.

REKA GOLDBERG HOFHEIMER,
Petitioner,

vs.

BEN GOLD, ETC., ET AL.,
Respondents.

REKA GOLDBERG HOFHEIMER,
Petitioner,

vs.

DAVID McINTEE, ETC., ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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INTRODUCTION.

Petitioner seeks review in two cases decided by the Circuit Court of Appeals for the Seventh Circuit in one opinion handed down December 15, 1943 (R. 181). The two cases were consolidated only as to the oral argument

and for the filing of a single printed record (R. 178). Briefly these two cases involve the following:

(a)

In Circuit Court of Appeals case No. 8262 petitioner appealed from an order confirming a plan of reorganization in proceedings for the reorganization of South State Street Building Corporation, debtor, under Chapter X of the Bankruptcy Act. Under the confirmed plan Sol H. Goldberg Properties Trust agreed to make certain payments secured by the pledge of certain properties over a period of twenty-seven (27) years to service a bond issue of the debtor.* Petitioner claimed to be entitled to one-third of the common stock of Hump Hairpin Manufacturing Company on the basis of an alleged oral agreement made with her brother Sol Goldberg in 1914, twenty-nine years ago. Hump Hairpin Manufacturing Company owns all of the common stock of Chain Store Products Corporation, which latter corporation is the owner of the beneficial interest in Sol H. Goldberg Properties Trust.

Chain Store Products Corporation agreed to the plan in order to settle a claim of the debtor against Chain Store Products Corporation in the amount of approximately Eight Hundred Thirty Thousand Dollars ($830,000). The nature of the transaction out of which the claim arose was fully disclosed to the trial court (R. 6-7). Additional considerations for Chain Store Products Corporation's undertaking were allocation of all of the stock of the debtor as

*Petitioner's allegation that the payments amount to $1,260,000 ignores three salient facts: (1) the payments are spread over a period of twenty-seven (27) years; discounting such payments at the rate of five per cent (5%) gives a present value of $683,400; (2) acquisition of the debtor's bonds under the sinking fund provided for should result in cutting down the payments to the extent that bonds are acquired at less than par; (3) the obligation could be discharged at any time by the payment of $878,950, the full amount of the bond issue.

reorganized to Chain Store Products Corporation and assignment to Chain Store Products Corporation of a claim against the estate of Sol H. Goldberg, allowed in the amount of $974,324.76 (R. 42, 44).

Petitioner alleged that the claim of the debtor against Chain Store Products Corporation was of no value because, she stated, it was founded upon Chain's dealings with debtor's claim for "future rent" against McCrory Stores Corporation, debtor's tenant in bankruptcy. It is insisted that this claim was not provable in the McCrory bankruptcy proceeding under the decision of *Manhattan Properties, Inc.* v. *Irving Trust Company*, 291 U. S. 320. Therefore, petitioner alleged, Chain's participation in the plan was without consideration and *ultra vires*. Petitioner ignores that this claim was dealt with in 1935 after the passage of Section 77B(10)(b), which makes such claims provable, and that McCrory Stores Corporation, against whom the claim existed, was being reorganized under Section 77B. It is thus apparent on the face of her objections that her whole position rests upon an erroneous legal proposition.

Petitioner did not intervene in the District Court.

Her appeal was dismissed by the Circuit Court of Appeals.

(b)

In Circuit Court of Appeals case No. 8263 petitioner appealed from an order of the District Court denying her a temporary injunction. The allegations of her complaint in equity, the sole basis for the application for the temporary injunction, were, so far as here important, identical with her objections to the plan of reorganization. The plan of reorganization was attached as an exhibit to her complaint.

The order below was affirmed.

SUMMARY OF ARGUMENT.

I.

The Circuit Court of Appeals correctly determined that petitioner had not intervened in the bankruptcy case, that she was not a party in interest entitled to be heard as a matter of right, nor to intervene upon petition, and that her appeal should be dismissed. This decision involves no conflict with the decisions of any other Circuit Courts of Appeals.

A.

Petitioner was not a party to the bankruptcy case, entitled to be heard as a matter of right.

Sec. 206, Chapter X of the Bankruptcy Act (11 U. S. C., § 606).

B.

Since no petition for intervention was filed by her, she had no standing to appeal.

Sec. 207, Chapter X of the Bankruptcy Act (11 U. S. C., § 607).

Rule 24 (c) of the Rules of Civil Procedure for the District Courts of the United States.

C.

Petitioner had no permissive right to intervene because she was not a party in interest and her claim was not germane to the bankruptcy proceedings.

Commercial Cable Staff's Association v. *Lehman*, 107 F. 2d 917.

II.

Petitioner's remedy, if any, is in her separate equity suit.

Commercial Cable Staff's Association v. *Lehman*, 107 F. 2d 917.

III.

The Circuit Court of Appeals denied petitioner no rights guaranteed by the Fifth or Fourteenth Amendments.

A.

There has been no final adjudication of petitioner's rights to equitable relief.

Rogers v. *Hill*, 289 U. S. 582.

B.

The complaint in equity stated no cause of action since it was based upon an erroneous theory of law.

Sec. 77B (10)(b) (11 U. S. C., § 207 (b)(10)).

ARGUMENT.

The Bankruptcy Case.

In an attempt to make a case for review by this court petitioner states that the Circuit Court of Appeals for the Seventh Circuit held that since petitioner was not entitled to be heard as a matter of right in the Bankruptcy Reorganization proceedings pursuant to Section 206 of Chapter X of the Bankruptcy Act (11 U. S. C., § 606), she had no right to intervene pursuant to § 207 of Chapter X (11 U. S. C., § 607) and Rule 24 of the Rules of Civil Procedure for the District Courts of the United States. Such is not the holding of the Circuit Court of Appeals.

Petitioner admits, as she must, that she is not a person entitled to be heard without intervention pursuant to § 206 of Chapter X. Inferentially, she admits and the Circuit Court of Appeals found that she did not intervene pursuant to the provisions of § 207 of Chapter X and Rule 24(c) of the Rules of Civil Procedure for the District Courts of the United States.

Thus, the judgment of the court below dismissing her appeal, was inevitable.

But her position has a further infirmity. The Circuit Court of Appeals pointed out that she had no interest entitling her to intervene, had she sought so to do (R. 188), and *Commercial Cable Staff's Association* v. *Lehman*, 107 F. 2d 917, although not cited, fully sustains this conclusion. There appellant, who had intervened below, an association of employees of Commercial Cable Company, a subsidiary of the debtor but not the debtor in reorganization, alleged that certain transfers provided for by the plan

of reorganization would render Commercial Cable Company insolvent or at least imperil its employees' claim against it. Despite appellant's intervention in the court below in this case, the Circuit Court of Appeals for the Second Circuit dismissed the appeal, stating at page 920:

> "Since the Association is neither a creditor nor a shareholder of either of the 'debtors', it had no standing to object to the plan, unless it may speak for the Commercial Cable Company, as preferred shareholder of the 'Associated Companies'. It is impossible to find any basis for allowing it so to speak. Merely as creditor it clearly had no standing; a man's creditors cannot control the conduct of his affairs while he remains solvent."

Petitioner, a minority stockholder of Chain Store Products Corporation's parent, is in substantially the same position as the appellant in the foregoing case.

None of the cases cited by petitioner conflicts with the holding of the Circuit Court of Appeals for the Seventh Circuit in this case, nor are they relevant to this controversy.

Securities and Exchange Commission v. *U. S. Realty and Improvement Company*, 310 U. S. 434, upheld the right to intervene of the Securities and Exchange Commission, a public body pursuing its statutory duty. *Klein* v. *Nu-Way Shoe Company*, 136 F. 2d 986, involved a permitted intervention by a stockholder of the bankrupt. In *Dana* v. *Securities and Exchange Commission*, 125 F. 2d 542, and in *In Re Keystone Realty and Holding Co.*, 117 F. 2d 103, persons named in Section 206 of Chapter X of the Bankruptcy Act were held not to be required to intervene in order to appeal. In *Rodgers* v. *Consolidated Rock Products Co.*, 114 F. 2d 108, a stockholder of the debtor given the right to be heard on a proposed modification of a plan by the trial court, was held to have the right to ap-

peal, and in *Seaboard Terminals Corporation* v. *West Maryland Ry. Co.*, 108 F. 2d 911, the lessor of the debtor's property, intervening below, was held entitled to be heard in the proceedings.

Obviously, in each of the above cases the intervenor was a party in interest, whereas petitioner is not a party in interest in this case. None of these cases holds that an interloper, heard on sufferance in the trial court, thereby obtains a right to appeal, as petitioner would have the Court believe.

No action of the Bankruptcy Court has or will deprive petitioner of any of her rights as an alleged stockholder of Hump Hairpin Manufacturing Company. She complains of acts of the directors of Chain Store Products Corporation, the subsidiary of the corporation in which she is a stockholder and sought to enjoin the directors of that company from acting, as she says, contrary to her interests. Her controversy with these directors may be, if she can state a cause of action with respect thereto, the subject matter for the equity suit she has brought but not for objection in the Bankruptcy Court. The proper forum is not the Bankruptcy Court, as pointed out in *Commercial Cable Staff's Association* v. *Lehman*, 107 F. 2d 917.

The Equity Case.

The petition presents three questions (p. 8); and only the third relates to the interlocutory appeal in the equity case, No. 8263. It is whether the Circuit Court of Appeals, by making certain statements, characterized by petitioner as "Purported Findings of Fact" deprived petitioner of her property without due process of law under the 5th and 14th Amendments. Consideration of the 14th Amendment may be dismissed at once as it applies only to state

action. Rule 38 of this Court providing that only questions specifically brought forward by the petition will be considered, excludes consideration of any question other than this due process question under 5th Amendment.

The three statements contained in the opinion of the court which petitioner complains constitute "Findings of Fact" without hearing are set out on page 5 of the petition and are (1) that the debtor had "a substantial claim" against Hump (as stated in the petition, but the opinion says Chain) the settlement of which was adequate consideration for the participation by Hump and its subsidiaries in the plan of reorganization of the debtor; (2) that by participation in the plan, Hump and its subsidiaries, in addition to settling the claim of the trustee of the debtor against it, would receive "other consideration of large proportions" in the form of rights to the new stock of the debtor and an assignment of Sol Goldberg's guarantee of the old bonds; and (3) that the complaint contained no allegation of fraud or gross mismanagement, or of facts showing *ultra vires* acts or irreparable injury. Petitioner says these statements are unsupported by evidence and contrary to the allegations of the verified complaint, and having been made without hearing or proof, they violate due process.

Petitioner confuses the *opinion* of the court with the *decision* of the court. Notwithstanding these statements in the opinion, the decree did not extend beyond mere affirmance of the District Court order denying a temporary injunction.

This case is ruled by *Rogers* v. *Hill*, 289 U. S. 582 (1933), in which the Circuit Court of Appeals on an interlocutory appeal from an order of the District Court granting a temporary injunction reversed and directed that the mandate issue to the District Court in accordance with "this

decree'' and the mandate directed further proceedings in accordance with ''the decision''. It held that a mandate directing proceedings in accordance with ''the decision'' does not direct dismissal of the case by the court below by reason of the fact that the *opinion* of the Circuit Court of Appeals dealt ''with matters affecting the merits'', and the court said (p. 586): ''The granting of temporary injunction involved no determination of the merits. Such a decree will not be disturbed on appeal except for improvident allowance, violation of the rules of equity or abuse of discretion''. This Court also said that if the Circuit Court of Appeals by reason of what is said in the opinion regarding the merits had meant to direct dismissal by the lower court it would have done so unequivocally and directly by means of language, form of decree and mandate generally employed for that purpose.

The statements in the opinion complained of by petitioner, even though directed to the merits, could not deprive her of her property. She will have her day in court and a full hearing as to whatever property or other rights are properly pleaded in her complaint when the equity case, No. 8263 is heard in the District Court.

The denial of a temporary injunction by the District Court was based upon the verified complaint as stated by the opinion in the Circuit Court of Appeals. The original and amended plans of reorganization are exhibits to and adopted as parts of the complaint (R. 145, 60). The statement in the opinion of the court that Hump, Chain and the trustees of the Trust were assuming obligations under the plan of reorganization in settlement of ''a substantial claim'' of the trustee of the debtor against Chain and Sol Goldberg, and the further statement in the opinion that by participating in the plan Hump, Chain and the Trust not only settled the claim against

Chain but caused "other considerations of large proportions" to flow to the Trust in the form of rights in the new stock of the debtor and an assignment of Sol Goldberg's guarantee of the old bonds, are warranted by provisions of the plan, made a part of the complaint (R. 6, 30, 42). It appears from the plan that the claim of the trustee of the debtor against Chain is based upon the $6,000,000 claim filed by the debtor in the McCrory 77B proceedings. This included a claim for $237,000.00 for accrued rent, the balance being for future rent. Chain and Goldberg caused this rent claim of the debtor to be sold for $250,000.00. At the same time and under the same arrangement a claim of Chain and Goldberg was sold for $385,000.00 plus certain valuable options to purchase stock in the reorganized McCrory Stores Corporation. The debtor's trustee contended that the Chain and Goldberg claims were of little, if any, value, and were trumped up for the purpose of diverting to Chain and Goldberg funds which should have gone to the debtor. Under applicable provisions of section 77B, the debtor had an allowable claim not only for the accrued but for future rent in an amount not exceeding three years rental. At the time the original plan of reorganization of the debtor was adopted the amount of the claim asserted by the trustee in bankruptcy against Chain was in excess of $800,000.00, which with statutory interest was probably in excess of $1,000,000.00.

All other statements of the opinion complained of by petitioner are to the effect that the complaint contains no allegations of fraud, gross mismanagement and alleges no facts showing *ultra vires* acts or irreparable injury. A reading of the complaint (R. 55) demonstrates the statements in the opinion were correct and do not constitute a decision without hearing.

The record amply supports the conclusion of the Cir-

cuit Court of Appeals that the District Court in denying the temporary injunction violated no rule of equity and did not abuse its discretion.

Conclusion.

In the bankruptcy case, review is sought of an obviously correct decision not in conflict with any other decision.

In the equity case, no final adjudication is involved, and no substantial question is presented.

In neither case is there any important question of law.

It is submitted that no grounds have been shown justifying the granting of writs of certiorari in these cases.

We submit that the petition for writs of certiorari should be denied.

Respectfully submitted,

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